BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
APPLICATIONS FOR CONSENT TO	)	**CC Docket 98-141**
THE TRANSFER OF CONTROL OF	)	
LICENSES AND SECTION 214	)	
AUTHORIZATIONS FROM AMERITECH	)	
CORPORATION, TRANSFEROR, TO SBC	)	
COMMUNICATIONS, INC., TRANSFEREE	)	

KMC TELECOM INC.'S OPPOSITION TO APPLICATIONS FOR TRANSFER OF CONTROL OF AMERITECH

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SUMMARY

The Commission should deny the applications for transfer of control of Ameritech Corporation's licenses and Section 214 authorizations to SBC Communications, Inc. The merger of SBC and Ameritech is not necessary for either company to be an effective competitor in local exchange markets outside their current service territories. Nor is the merger likely to promote competition either inside or outside the current service territories of SBC and Ameritech.

Contrary to the representations made in support of the transfer applications, SBC has not opened its local telephone markets to competition. Instead, its operating subsidiaries consistently have fought the entry of competitors, resisted complying with the terms and conditions of both arbitrated and negotiated interconnection agreements and forced competitors to seek regulatory intervention to obtain what they are entitled to under the Telecommunications Act of 1996. By approving SBC's acquisition of Ameritech, the Commission would allow SBC to expand the reach of its anticompetitive conduct to an additional five states.

If the Commission does determine that the merger would not be inconsistent with the public interest, it must impose stringent conditions on the merged entity and steep financial penalties for violation of the conditions. The conditions attached to the Bell Atlantic/NYNEX merger should be the starting, rather than the ending, point for discussion. The Commission should adopt additional conditions that will create the realistic possibility that the local exchange markets in the combined entity's 13 states can be irreversibly opened to competition.

TABLE OF CONTENTS

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	)	
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KMC TELECOM INC.'S OPPOSITION TO APPLICATIONS FOR TRANSFER OF CONTROL OF AMERITECH

KMC Telecom Inc. ("KMC") and its affiliates are competitive local exchange carriers authorized to provide service in sixteen states and Puerto Rico. KMC currently offers local exchange service on a resale and facilities-basis in competition with Southwestern Bell Telephone Company ("SWBT") in Texas and in competition with Ameritech in Wisconsin and Michigan.[1] KMC submits that the proposed acquisition of Ameritech Corporation by SWBT's parent company, SBC Communications, Inc. ("SBC") will not serve the public interest. SBC and its operating companies have strenuously resisted competition in the local exchange market at every turn. Approval of the merger will afford SBC the opportunity to delay and frustrate the development of competition in an additional five states. For this reason alone, the Commission should deny the applications for transfer of control.

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[1] KMC is also preparing to launch service in competition with SWBT in Kansas. .

I. INTRODUCTION

SBC's proposed acquisition of Ameritech Corporation is of tremendous significance from the standpoint of the future of competition in the local exchange market. As a result of its acquisition of Pacific Telesis, SBC already controls over 33 million local access lines in seven states, including the two most populous states of California and Texas.[2] After its acquisition of Ameritech, SBC would control some 54 million access lines,[3] approximately one-third of the country's total access lines.[4] Because Congress enacted the Telecommunications Act of 1996 ("Act") to open the local telephone markets to competition, only the most compelling public benefits could possibly be found to justify such an extreme concentration of control of the nation's local access lines in the hands of one incumbent monopolist, especially SBC.

SBC's description of the potential public benefits of the merger is weak. Whatever potential benefits there may be, however, must be weighed against the impact of the merger on competition in the local exchange markets that SBC will dominate. KMC submits that allowing SBC to further extend the geographic scope of its monopoly poses a grave danger to the development of competition.

SBC alleges that the combined companies will promote competition in the local telephone market throughout the current SBC and Ameritech service territories and beyond. In

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[2] SBC Communications, Inc., Form 10-K, filed March 13, 1998, at 5.

[3] Ameritech has 20.5 million access lines. Ameritech Corporation, Form 10-K, filed March 13, 1998, at 2.

[4] The total number of access lines in the country as of July 1, 1997 was 154.5 million. FCC Common Carrier Bureau, Industry Analysis Division, Trends in Telephone Service, at 112-114 and n. A (February 1998).

support of this position, SBC contends that it plans to enter 30 of the largest local exchange markets outside of the combined SBC/Ameritech service territories and claims that its entry into the markets of other incumbent LECs will encourage those ILECs to enter its markets. According to SBC, consumers will reap the benefits of this increased competition.

SBC's stimulation of competition argument is not persuasive. SBC and Ameritech, as well as the other Bell Operating Companies, currently have sufficient resources and technical know-how to compete in one another's local telephone markets. Yet, they have not done so to any significant extent. SBC's and Ameritech's failure to venture outside their current service territories is surprising in light of the fact that they could offer out-of-region customers both local and long-distance service -- i.e., the one-stop shopping that the BOCs complain so bitterly about being denied the right to offer in-region. The merger of the two companies is in no way a necessary predicate for either SBC or Ameritech to enter each other's local exchange markets or the local exchange markets of their sister BOCs. Indeed, the merger would have the anticompetitive effect of removing each company as a potential competitor in the other's region.

As demonstrated below, SBC has a history of vigorously resisting competition in its existing local exchange markets. Rather than promoting competition, SBC's acquisition of Ameritech will simply allow SBC to impede competition in an additional five states. Such a result definitely will not serve the public interest.

II. HISTORY REVEALS THAT SBC'S CONTROL OF THE LOCAL EXCHANGE MARKETS IN THE AMERITECH STATES WILL NOT BE GOOD FOR COMPETITION.

Following SBC's acquisition of Pacific Telesis, all but 13 of PacTel's top 35 executives exercised their golden parachutes and left the company.[5] According to press reports, Ameritech's top five executives also have golden parachutes that would allow them to leave the company post-merger with very attractive financial packages.[6] Thus, if the merger is approved, it is more than likely that it will be SBC's current management that will control approximately 35% of the nation's local access lines and will oversee the provision of local telephone service in 13 states.

In a statement before the House Judiciary Committee earlier this year, Commissioner Ness noted that "the ultimate goal of the competitive analysis of a merger is to determine how the merger will affect the development of competition as the transition to a deregulated environment envisioned by the Telecommunications Act of 1996 evolves."[7] In determining how the proposed SBC/Ameritech merger will affect the development of competition, the Commission must take into account SBC's well-established propensity to fight and delay the entry of competitors into

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[5] Poling, "SBC, Ameritech Are Contrasts In Style," *The Orange County Register*, May 12, 1998, C3, 1998 WL 2627981 ("PacTel chairman and chief executive Phil Quigley stayed with the company just nine months after his company merged into SBC before leaving with his $10 million golden parachute.").

[6] *Id.*; Keller, "Growing Up: SBC Communications To Acquire Ameritech In a $55 Billion Deal," *The Wall Street Journal*, May 11, 1998, A1, 1998 WL-WSJ 3493498.

[7] Statement of Commissioner Susan Ness, Federal Communications Commission, on Mergers and Consolidation in the Telecommunications Industry Before the Committee on the Judiciary, U.S. House of Representatives, at 3 (June 24, 1998).

its existing monopoly markets. As the number of markets that SBC controls expands, so too does the reach of its corporate culture -- a culture which experience has shown encourages the suppression of competition in a manner that completely frustrates the intent of Congress in passing the Telecommunications Act of 1996 (the "Act").

A. SBC Has Worked Hard To Thwart The Development Of Competition In Texas

In his affidavit filed in support of the transfer applications, Stephen Carter, President of SBC Telecommunications, Inc.'s Special Markets Group, states that "SBC is committed from the highest levels of the company to open its local networks to enable others to enter the local exchange telecommunications markets in which SBC operates." Carter Affidavit at 3. Unfortunately, SBC's alleged corporate "commitment" does not translate into an open entry policy in the real world as evidenced by the obstacles SBC has erected to constrain local competition in Texas. The following examples of SBC's recalcitrance in opening its markets demonstrate that very little, if any, weight should be accorded to Mr. Carter's statement.

1. SBC Has Resisted The Texas PUC's Efforts To Implement The Act

During the summer of 1996, the Texas Public Utility Commission ("PUC") consolidated for hearing the first five arbitration petitions that were filed against SWBT pursuant to Section 252 of the Act. *Petition of MFS Communications Company, Inc. for Arbitration, et al.,* Texas PUC Docket Nos. 16189, *et al.* The PUC's November 7, 1996 Arbitration Award addressed numerous issues, including SWBT's obligation to provide access to unbundled network elements, the terms and conditions for interconnection, resale, access to poles, ducts, conduits and rights of way, directory and operator services and telephone directory listings. The PUC

rejected SWBT's proposed rates for interconnection and unbundled elements as well as its proposal to negotiate and price physical collocation on an individual case basis. It directed SWBT to submit revised cost studies using a total long run incremental cost methodology and to tariff the rates, terms and conditions for physical collocation. The PUC also set interim rates for interconnection, unbundled elements and collocation which were to apply until the parties either negotiated or arbitrated permanent rates based on the revised cost studies. *Arbitration Award* in PUC Docket Nos. 16189, *et al.* (Tex. PUC November 7, 1996).

As soon the interconnection agreements incorporating the terms and interim rates established in the Arbitration Award were approved by the PUC, SWBT sued the PUC and each of the other parties to the arbitration in federal district court, alleging that the Arbitration Award and the resulting interconnection agreements violated Sections 251 and 252 of the Act. The court ruled in favor of the defendants on each and every one of SWBT's claims for relief. In so ruling, the court offered the following comments on SWBT's litigation tactics:

> The undersigned must note, however, that it was somewhat troubled by SWBT's tactics in this case. SWBT's penchant for rehashing issues that had already been fully briefed, raising arguments and claims that did not appear in even the most generous reading of the Amended Complaint, and most, importantly, taking positions in this litigation that it had expressly disavowed in the PUC administrative hearing, were, to say the least, distressing. The voluminous briefing in this case -- over seven hundred pages in total -- could probably have been cut in half had SWBT *not fought tooth and nail for every single obviously non-meritorious point.* Suffice it to say that every conceivable objection SWBT could have raised to the interconnection agreements was, in fact, raised, here and fully briefed by all parties to the lawsuit. The Court has considered these arguments and has concluded that the arbitrated terms of the interconnection agreements fully comply with the requirements of §§ 251 and 252 of the FTA and that the PUC's decisions regarding those arbitrated terms did not involve a misinterpretation or misapplication of federal law and were not arbitrary and capricious.

Southwestern Bell Telephone Company v. AT&T Communications of the Southwest, Inc., et al., No. A 97-CA-132 SS, Order, at 31 (W.D. Tex., August 31, 1998) (emphasis added). Clearly, the court's characterization of SWBT's behavior far more accurately reflects SBC's attitude toward competition than Mr. Carter's self-serving statements.

Simultaneously with its filing in federal court, SWBT filed a similar complaint in state court, alleging that the PUC's Arbitration Award violated various provisions of state law. After being removed to federal court, the case was dismissed on preemption grounds. *Southwestern Bell Telephone Company v. Public Utility Commission of Texas, et al.*, No. A-97-108 SS, Order (W.D. Tex., August 10, 1998). SWBT has appealed that decision to the Fifth Circuit. Southwestern Bell Telephone Company's Notice of Appeal in *Southwestern Bell Telephone Company v. Public Utility Commission of Texas, et al.*, No. A-97-108 SS filed September 30, 1998.

In the meantime, SWBT filed its collocation tariff and revised cost studies and proposed permanent rates based on those studies. Although the PUC had stated in the Arbitration Award that "the adjustments in SWBT cost studies required by this Award will lower SWBT's proposed prices in all instances,"[8] SWBT's proposed permanent rates were higher in many instances than the rates originally proposed. As a result, the parties were forced to file renewed arbitration petitions against SWBT requesting that the PUC set permanent rates. Just over one year after the first Arbitration Award was issued, the PUC issued another Award setting permanent rates and directing SWBT to revise its collocation tariff consistent with the terms of the Award.

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[8] *Arbitration Award*, PUC Docket Nos. 16189, *et al.*, at ¶ 85 (Tex. PUC November 7, 1996).

Arbitration Award in Docket Nos. 16189, *et al.* (Tex. PUC, December 7, 1997). Again, as soon as the amended interconnection agreements incorporating the terms of the Arbitration Award were approved by the PUC, SWBT filed suit in federal and state court against the PUC and the parties to the arbitration seeking to vacate the Award and the orders approving the agreements as inconsistent with Sections 251 and 252 of the Act and Texas law. *Southwestern Bell Telephone Company v. AT&T Communications of the Southwest, Inc.* Civil Action No. A 98-CA-197 SS (W.D. Tex.); *Southwestern Bell Telephone Company v. AT&T Communications of the Southwest, Inc.,* Cause No. 98-04970 (98th Judicial District Court of Travis County). Those cases are still pending. The pendency of SWBT's challenges to the PUC's orders setting permanent rates and other terms and conditions for interconnection and access to unbundled elements obviously creates a tremendous amount of uncertainty for would-be competitors – uncertainty that may serve as a deterrent to market entry. Thus, SWBT is still actively fighting the PUC's efforts to implement the Act almost two years after the first arbitration petitions were filed. Such conduct is not consistent with the "commitment to competition" that Mr. Carter articulates.

2. SWBT Has Failed To Honor The Terms Of Its Voluntary Agreements

In addition to fighting the PUC's determinations with respect to issues resolved by arbitration, SWBT has resisted complying with the terms of interconnection agreements that it voluntarily negotiated with its competitors, which has led to additional litigation. For example, in mid-1997, SWBT unilaterally decided that it would not pay reciprocal compensation for local telephone calls to Internet service providers even though the interconnection agreements it had entered into with competing carriers contained no exclusion for such traffic. Upon Time Warner's complaint alleging that SWBT was in breach of its interconnection agreement, the PUC

issued a decision directing SWBT to comply with the terms of the agreement and pay reciprocal compensation for the transport and termination of Internet service provider traffic. *Complaint and Request For Expedited Ruling of Time Warner Communications,* PUC Docket No. 18082 (Tex. PUC March 2, 1998). SWBT immediately sought review in federal district court, requesting a preliminary injunction and a declaratory ruling that the PUC's decision was wrong. The court issued an order on June 22, 1998 affirming the PUC's decision, denying SWBT's request for preliminary injunction and dismissing SWBT's complaint. *Southwestern Bell Telephone Company v. Public Utility Commission of Texas, et al.*, MO-98-CA-43 (W.D. Tex. June 22, 1998).

SWBT has also refused to comply with the resale terms of the interconnection agreement that it voluntarily negotiated with KMC. The Agreement states that it "shall be construed in light of and consistent with the provisions of the Act" and that "resale products are available subject to federal rules and regulations." In the *Local Competition Order,*[9] this Commission made crystal clear that nothing in Section 251(c)(4) of the Act excuses incumbent LECs from making contracts and other customer specific arrangements available for resale at a wholesale discount. Despite the plain language of the Act and the Commission's construction thereof, SWBT refused to make customer contracts available for resale in Texas. As a result, in August 1997, KMC was forced to file a complaint with the PUC seeking an order directing SWBT to comply with its obligations under Section 251(c)(4) of the Act.

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[9] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996), *aff'd. in part and vacated in part sub nom. Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997), *cert. granted*, Nos. 97-826, *et al.* (U.S. Jan. 26, 1998).

Even after this Commission released its decisions in the BellSouth Section 271 cases reiterating that Section 251(c)(4) requires incumbent LECs to make existing customer contracts available for resale at a wholesale discount,[10] SWBT continued in its adamant refusal to make such contracts available to KMC for resale. On March 19, 1998, the PUC Arbitrators properly concluded that SWBT had to make customer contracts available for resale and scheduled a subsequent hearing to determine the amount of the wholesale discount.[11] *Complaint of KMC Telecom Inc. Against Southwestern Bell Telephone Company For Violations of Section 251(c)(4) of the Telecommunications Act of 1996*, PUC Docket No. 17759, Order No. 6 (Tex. PUC, March 19, 1998). The case is still pending.

3. The Texas PUC's Assessment Of SBC's Commitment To Competition

When SWBT filed its draft Section 271 application with the PUC last March, carriers attempting to enter the Texas local exchange market presented substantial evidence of the difficulties they regularly encountered in working with SWBT to interconnect their networks, purchase unbundled elements and provide resale. The testimony revealed SWBT's policy of

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[10] *Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region InterLATA Service in South Carolina*, 13 FCC Rcd 539 (1997); *Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region InterLATA Service in Louisiana*, 13 FCC Rcd 6245 (1998).

[11] During the August 31, 1998 hearing on the discount issue, SWBT introduced its arbitrated interconnection agreement with AT&T, which contains language stating that the wholesale discount shall apply only to the resale of new, rather than existing, customer contracts as support for its position that it has no obligation to resell existing contracts at a discount. (Prefiled Testimony of Barbara Smith submitted in PUC Docket No. 17759.) Significantly, SWBT's *interconnection agreement with Ameritech* contains no such restrictive language. (KMC Ex. 7 submitted in PUC Docket No. 17759.)

fighting CLECs "tooth and nail" on every conceivable issue, even issues that the PUC had previously decided in favor of other CLECs. This evidence prompted scathing comments from the Texas Commissioners on the lengths to which SWBT has gone to keep competitors out of its market.

After reviewing the evidence, Commissioner Walsh questioned whether any of the CLECs trying to break into the Texas market

> is or can become a true competitive alternative to Southwestern Bell in light of *Southwestern Bell's lack of cooperation and efforts to frustrate the CLEC's efforts to enter the market.* . . .
>
> The record is replete with examples of *Southwestern Bell's failure to meaningfully negotiate, reluctance to implement the terms of the arbitrated agreements, lack of cooperation with customers and evidence of behavior which obstructs competitive entry.*[12]

Commissioner Curran echoed Commissioner Walsh's indictment of SWBT:

> Here we have a situation where potential competitors have spent enormous time and effort and probably enormous sums of money attempting to gain a foothold in the local telephone market. The regulatory agency has spent untold hours in an effort to establish mechanisms under which the phone customers of Texas will have a choice in their local phone service, and this enormous effort has resulted in a movement of just 1 percent of phone customers to competitors. I don't believe the record supports the explanation that this is the result of a lack of interest, either on the part of consumers or on the part of potential competitors.
>
> Currently, *there are CLECs with de minimis customers, and even those de minimis customers have been secured only with tremendous efforts and with Bell resisting at every turn.* Will these CLECs and other CLECs be able to retain even this level of customer base into the future, much less to provide a real competitive

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[12] May 21, 1998 Transcript of hearings in *Investigation of Southwestern Bell Telephone Company's Entry Into the Texas InterLATA Telecommunications Market,* Project No. 16251, at 187 (Commissioner Walsh) (emphasis added).

alternative to additional subscribers? Under current practice, it is highly doubtful.[13]

SWBT's treatment of its competitors in Texas demonstrates a corporate policy of resisting competition at every stage and ceding nothing without a fight. For example, despite the fact that the PUC's Arbitration Award directed SWBT to tariff the rates, terms and conditions for physical collocation, SWBT had refused to allow CLECs who were not parties to the arbitration to purchase collocation out of the tariff. SWBT advised such CLECs that the only way they could take advantage of the tariffed rates, terms and conditions was to opt into the interconnection agreement of one of the parties to the arbitration pursuant to Section 252(i) of the Act. After CLECs brought this issue to the attention of the PUC during the hearings on SWBT's application for authority to enter the interLATA market, the PUC ordered SWBT to allow any CLEC that wanted to physically collocate in SWBT's central offices to buy out of the tariff without having to opt into another carrier's agreement. *Investigation of Southwestern Bell Telephone Company's Entry Into the Texas InterLATA Telecommunications Market,* Project No. 16251, Commission Recommendation, at 3 (Tex. PUC, June 3, 1998).

Similarly, despite the fact that the PUC had concluded in the *Time Warner* case that SWBT must pay reciprocal compensation for the termination of local calls to Internet service providers, SWBT took the position that it would not pay reciprocal compensation for such traffic to other CLECs unless they filed and prevailed in their own arbitration proceedings against

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[13] May 21, 1998 Transcript of hearings in *Investigation of Southwestern Bell Telephone Company's Entry Into the Texas InterLATA Telecommunications Market,* Project No. 16251, at 202, 203-204 (Commissioner Curran) (emphasis added).

SWBT. When this was brought out in the Section 271 hearings, the PUC rejected SWBT's contention that other CLECs should be required to relitigate an issue that had already been decided. The PUC had to direct SWBT to abide by its earlier ruling and to pay such CLECs reciprocal compensation for Internet service provider traffic. *Investigation of Southwestern Bell Telephone Company's Entry Into the Texas InterLATA Telecommunications Market,* Project No. 16251, Commission Recommendation, at 8.

In addition, despite the fact that the PUC had concluded in the *KMC* case that SWBT must make customer contracts available for resale at a wholesale discount consistent with Section 251(c)(4) of the Act, SWBT refused to make such contracts available for resale to other CLECs. When this was brought to the PUC's attention in the Section 271 hearings, the PUC had to direct SWBT to change its policy on the resale of customer contracts and demonstrate compliance with this Commission's interpretation of Section 251(c)(4). *Investigation of Southwestern Bell Telephone Company's Entry Into the Texas InterLATA Telecommunications Market,* Project No. 16251, Commission Recommendation, at 9.

At the conclusion of the hearings on SWBT's draft 271 application, the PUC wisely observed that "SWBT needs to change its corporate attitude and view [its competitors] as wholesale customers. . . . SWBT needs to show this Commission and participants during the collaborative process by its actions that its corporate attitude has changed and that it has begun to treat CLECs like its customers. . . ." *Investigation of Southwestern Bell Telephone Company's Entry Into the Texas InterLATA Telecommunications Market,* Project No. 16251, Commission Recommendation, at 2. The PUC also had to direct SWBT to demonstrate that it is in

compliance with existing PUC orders and that it intends to follow future directives of the PUC. *Id.*, at 2, 5.

The PUC's assessment of SBC's corporate attitude toward competition was based on substantial evidence of SWBT's efforts to delay and restrain the entry of competitors into its monopoly local exchange market in Texas. The PUC's objective assessment of SWBT's obstructionist tactics cannot be reconciled with SBC's self-serving representations to this Commission of its open-armed embrace of competition and its purported efforts to enable competitive entry.

B. SBC's Takeover Of PacTel Has Had Negative Impacts On Both Competitors And Consumers.

In his affidavit in support of the merger, Mr. Carter states that "SBC's record in opening its networks in the Southwestern Bell, Pacific Bell and Nevada Bell areas demonstrates SBC's commitment to its obligations under the 1996 Act. That has been the case with our merger with Pacific Telesis and there is no reason to expect it will be any different with Ameritech." (Carter Affidavit at 15.) As demonstrated above, SBC's record in opening its network in Southwestern Bell's territory reflects anything but a commitment to comply with its obligations under the Act. Moreover, since SBC acquired Pacific Bell in April 1997, the evidence shows that Pacific Bell's treatment of competitors and consumers in California has deteriorated. If, as Mr. Carter states, there is no reason to expect that things will be any different with Ameritech, there is more than a sufficient basis for the Commission to deny the applications for transfer of control.

1. Pacific Bell Has Adopted SBC's Policy Of Keeping the Competition at Bay

The same types of anticompetitive conduct that surfaced with respect to SWBT's operations in the Texas Section 271 proceeding were also raised in connection with Pacific Bell's application to obtain interLATA authority in California. For example, in its recent report on Pacific Bell's notice of intent to file for Section 271 authority in California, the Public Utilities Commission Staff cited Pacific Bell for the misuse of customer proprietary network information ("CPNI") to maintain or win back customers that had elected to take service from the competition. *California Public Utilities Commission Telecommunications Division, Initial Staff Report, Pacific Bell (U 1001C) and Pacific Bell Communications Notice of Intent To File Section 271 Application for InterLATA Authority in California,* at 26 (July 10, 1998). Only one month earlier, the Texas PUC had cited SWBT for the same infraction and had to direct SWBT not to use CPNI to win back customers lost to competitors. *Investigation of Southwestern Bell Telephone Company's Entry Into the Texas InterLATA Telecommunications Market,* Project No. 16251, Commission Recommendation, at 3. Clearly, the improper use of CPNI to counteract the sales efforts of competitors does not evidence an intent on SBC's part to open its markets to competition.

The California staff also identified a number of deficiencies in Pacific Bell's provision of collocation space (or more accurately, failure to provision) to its competitors. These deficiencies included Pacific Bell's denial of access to collocation in key central offices on the grounds of an alleged lack of space; its failure to deliver collocation space on schedule; and its rules for the implementation of physical and virtual collocation which were not only ambiguous, but also subject to change by Pacific Bell unilaterally. *California Public Utilities Commission*

Telecommunications Division, Initial Staff Report, Pacific Bell (U 1001C) and Pacific Bell Communications Notice of Intent To File Section 271 Application for InterLATA Authority in California, at 37. Similar deficiencies were identified with respect to SWBT's collocation offering in Texas. The Texas PUC directed SWBT to establish performance measures for the number of days required to complete physical collocation facilities in response to concerns raised at the hearing with respect to SWBT's failure to deliver collocation space on schedule. *Investigation of Southwestern Bell Telephone Company's Entry Into the Texas InterLATA Telecommunications Market,* Project No. 16251, Commission Recommendation, at 9. Although the PUC tried to avert problems arising from ambiguous rules and allegations of lack of space by requiring SWBT to tariff its collocation terms and conditions, it then had to direct SWBT to make that tariff available to all CLECs.

In addition, the California staff found that, as a condition of obtaining access to Pacific Bell's new OSS interfaces, CLECs were required to sign an OSS appendix that contained a number of unfavorable and suspect provisions. Among the offensive provisions were that CLECs would not be provided access to customer service records ("CSRs") until after the customer had agreed to switch carriers. The denial of timely access to such vital information clearly hampers a CLEC's ability to make an effective sales presentation to a customer. Pacific Bell also reserved the right to modify or discontinue use of any OSS interface upon 90 days' prior written notice, a reservation of rights which obviously subjects CLECs to tremendous financial and operational uncertainty. Finally, the OSS appendix required the signatory to agree that Pacific Bell "provides nondiscriminatory access to its OSS interfaces." The Staff appropriately noted that Pacific Bell's insistence on these terms appeared to constitute an abuse

of market power. *California Public Utilities Commission Telecommunications Division, Initial Staff Report, Pacific Bell (U 1001C) and Pacific Bell Communications Notice of Intent To File Section 271 Application for InterLATA Authority in California,* at 29-31. In the Texas proceeding, the PUC also raised concerns about SWBT's attempt to force CLECs to agree to certain contractual provisions as a condition of SWBT's performance of its obligations under the Act. For example, the PUC instructed SWBT that it could not condition its obligation to pay a CLEC reciprocal compensation on the CLEC's acceptance of other contractual terms and conditions. *Investigation of Southwestern Bell Telephone Company's Entry Into the Texas InterLATA Telecommunications Market,* Project No.16251, Commission Recommendation, at 8.

Issues relating to compliance with the requirements of Section 252(i) of the Act were also raised against SBC's operating affiliates in both California and Texas. The California Staff questioned Pacific Bell's refusal to comply with its obligations under Section 252(i) of the Act by making the terms and conditions of an interconnection agreement entered into with one paging company available to other paging companies and directed Pacific Bell to supply the reasons for its noncompliance. *California Public Utilities Commission Telecommunications Division, Initial Staff Report, Pacific Bell (U 1001C) and Pacific Bell Communications Notice of Intent To File Section 271 Application for InterLATA Authority in California,* at 41. In the Texas Section 271 proceeding, the PUC had to direct SWBT to "establish that its interconnection agreements are binding and are available on a nondiscriminatory basis to all CLECs." *Investigation of Southwestern Bell Telephone Company's Entry Into the Texas InterLATA Telecommunications Market,* Project No. 16251, Commission Recommendation, at 2.

SBC's corporate policy of hostility toward competitors clearly has permeated Pacific Bell's operations in California. The Commission should not let the same fate befall the Ameritech states.

2. SBC Has Caused Pacific Bell to Take an Anti-Competitive Position on an Issue Where Ameritech Took a Pro-Competitive Position

AirTouch Communications, a wireless provider, provided a striking example of SBC's efforts to nullify Pacific Bell's pro-competitive undertakings after it took control. According to Comments filed with the Public Utilities Commission of Ohio,[14] Pacific Bell had informed AirTouch that it could purchase the billing and collection services needed to implement its Calling Party Pays ("CPP") program out of the Pacific Bell tariff. CPP is a billing option AirTouch offers to its wireless customers, pursuant to which the calling party, rather than the wireless customer, is billed for calls placed to wireless customers. By allowing wireless customers to avoid the charges for incoming calls, CPP reduces the cost of wireless service and makes it more economical for customers to leave their phones on at all times to receive incoming calls. The availability of CPP goes a long way toward making wireless service a substitute for, rather than merely a complement to, wireline service, thereby increasing the competitive choices for local telephone service available to consumers. An essential element for the deployment of CPP is a billing and collection agreement with the incumbent LEC.

Prior to SBC's acquisition of Pacific Bell, AirTouch had negotiated a market trial for CPP in California with Pacific Bell pursuant to which Pacific Bell had agreed to provide a

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[14] *In the Matter of the Joint Application of SBC Communications, Inc., SBC Delaware, Inc. and Ameritech Ohio for Consent and Approval of a Transfer of Control*, Case No. 98-1082-TP-AMT, Comments of AirTouch Communications, filed September 4, 1998.

number of services, including billing and collection, necessary for implementation of the trial. Within weeks of SBC's acquisition, Pacific Bell stopped working with AirTouch and eventually told AirTouch that it was no longer interested in pursuing the market trial. SBC later informed AirTouch that AirTouch could not use Pacific Bell's tariffed billing and collection services to provide CPP. As a result, AirTouch was forced to file a complaint with the California Public Utilities Commission to compel Pacific Bell to honor the terms of its tariff.[15]

In the BellSouth Louisiana 271 decision, the Commission noted that while wireless providers are positioning their service offerings to become competitive with wireline service, they are still in the process of transitioning from a complementary service to a competitive equivalent to wireline service.[16] SBC's refusal to allow Pacific Bell to provide AirTouch the billing and collection services necessary to implement CPP is plainly designed to impede the development of wireless services as a commercial and competitive alternative to Pacific Bell's wireline service.

According to AirTouch, it currently has billing and collection agreements with Ameritech that allow it to offer CPP. If SBC's acquisition of Ameritech is approved, AirTouch is justifiably concerned that its experience with Pacific Bell -- i.e., blocking AirTouch's ability to provide CPP post-merger - will be repeated in the Ameritech states. SBC's blatant use of its monopoly power to squelch competition is in significant contrast to the position taken by

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[15] AirTouch Comments at 7-8; *AirTouch Cellular v. Pacific Bell*, Case No. 97-12-044 (Cal. PUC, filed December 23, 1997).

[16] *Application of BellSouth Corporation, et al. Pursuant to section 271 of the Communications Act of 1934, as amended, to Provide In-Region InterLATA Service in Louisiana*, 13 FCC Rcd 6245, at ¶73 (1998).

Ameritech on this important competitive issue, and is an illustration of the competitive harm that would ensue if the SBC corporate culture takes over at Ameritech.

3. Consumer Dissatisfaction Has Increased Under SBC's Management

Since SBC's acquisition of Pacific Bell, a number of complaints have been filed with the California Commission relating to Pacific Bell's business practices and customer service policies. In an Order Instituting Rulemaking released on June 18, 1998, the California Commission noted that formal and informal customer complaints about deteriorating telephone service had proliferated in the last year, prompting it to open an investigation on service quality standards. *Order Instituting Rulemaking On The Commission's Own Motion Into The Service Quality Standards For All Telecommunications Carriers and Revisions to General Order 133-B,* R.98-06-029 (Cal. PUC, June 18, 1998). Coincidentally, SBC assumed control of Pacific Bell just over a year before the release of the Commission's Order.

Moreover, Pacific Bell's own employees recently filed a complaint with the California Commission alleging that SBC had implemented an aggressive, irresponsible and deceptive sales policy, which emphasized sales over service, customer satisfaction and customer welfare. *Telecommunications International Union, International Federation of Professional and Technical Engineers, AFL-CIO v. Pacific Bell and SBC* , filed June 18, 1998 with the California Public Utilities Commission.

The Utility Consumers Action Network ("UCAN"), a San Diego-based consumer watchdog group, has filed numerous complaints against Pacific Bell alleging that residential service has deteriorated significantly under SBC's stewardship. Examples of service deteriorations cited by UCAN include Pacific Bell's plans to close public offices, which would

have a disproportionate impact on low income and elderly customers who use the offices to pay bills, reinstate service or interact on a face to face basis with Pacific Bell employees;[17] and Pacific Bell's allegedly deceptive and misleading marketing campaigns for Caller ID and related services.[18]

* * *

Based on the foregoing, SBC has not demonstrated a commitment to facilitate the entry of competitors into its local exchange markets. The Congressional goal of opening the telecommunications markets to competition and making available to consumers a choice of local telephone service providers would be realized far more rapidly if new entrants could devote their resources to constructing networks, developing innovative products and marketing their services to customers rather than to litigating against SBC's affiliates to obtain what they are entitled to under the Act and the Commission's rules. The more local markets that SBC controls, the more money competitors will be forced to spend to enforce their rights to gain access to the incumbent's networks on reasonable and nondiscriminatory terms. The development of competition will most definitely not be promoted if Ameritech's states are brought under SBC's control.

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[17] UCAN March 23, 1998 Protest of Pacific Bell Advice Letters 19291 and 19294 -Office Closures.

[18] *The Utility Consumers's Action Network v. Pacific Bell (U-1001-C),* C. 98-04-004 (Cal. PUC, filed June 2, 1998).

III. THE IMPOSITION OF CONDITIONS IS A CRITICAL, BUT NOT NECESSARILY ADEQUATE, MEASURE TO OFFSET THE POTENTIAL ANTICOMPETITIVE EFFECTS OF THE MERGER

A. Conditions Are Not An Effective Means Of Alleviating The Anticompetitive Concerns Raised By SBC's Acquisition Of Ameritech

The Bell Atlantic/NYNEX experience has shown that even if conditions are imposed on the merger of two incumbent LECs, compliance is not guaranteed. Charges have already been made that Bell Atlantic/NYNEX has not complied with its merger conditions. In a complaint filed with this Commission last spring, MCI asserted that "Bell Atlantic previously failed to comply with the Merger Order, and continues to do so, through its failure to price unbundled network elements based on forward-looking economic costs. . . . Bell Atlantic has now compounded its complete disregard for the critical market-opening provisions in the Commission's Merger Order by refusing to negotiate in good faith to develop adequate performance standards, remedies, and associated reporting."[19]

Given the enormous stake that SBC/Ameritech will have in preserving its in-region local exchange monopoly, it will have little to lose by skirting compliance with any conditions designed to ensure that its markets are opened to competition, even if compliance orders result. SBC's operating history in Texas shows that it is not timid about forcing its competitors to repeatedly invoke the regulatory process to obtain what they are entitled to under the law. For this reason, the Commission cannot view conditions as a panacea that will alleviate the anticompetitive impacts of the merger.

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[19] Complaint of MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc., File No. E-98-32 (filed Mar. 17, 1998).

B. If The Commission Approves The Merger, It Must Impose Market-Opening Conditions, With Strong Sanctions For Non-Compliance.

If the Commission does approve SBC's acquisition of Ameritech, it must impose strict market-opening conditions to guard against competitive harms. The Bell Atlantic/NYNEX merger conditions are a step in the right direction, but are not sufficient to address the competitive harms that are likely to result from SBC's acquisition of Ameritech. The Commission should supplement these conditions to ensure that SBC/Ameritech is precluded from using its combined size and market power to discriminate against smaller local exchange competitors.

At a minimum, the Commission should require SBC/Ameritech, if it applies for in-region interLATA authority following the merger, to demonstrate that effective competition exists *throughout its entire region*, rather than simply in one state. Such a condition would provide much-needed safeguards against an abuse of market power by the new BOC giant, and furnish the additional incentives necessary to induce the combined company to take steps to open all of its markets to competition.

The Commission should also require SBC/Ameritech to provide combinations of network elements at forward-looking cost-based rates. The BOC's refusal to combine network elements for their competitors and their insistence on dismantling preexisting combinations have proven to be effective means to stymie competitive entry. As a step toward ensuring that the market is open to competitors, SBC/Ameritech should be required to eliminate these patently arbitrary and discriminatory practices with respect to network element combinations throughout its combined region.

The Commission should also require SBC/Ameritech to submit *monthly* performance reports, in lieu of the quarterly reports required in the context of the Bell Atlantic/NYNEX merger. Since SBC/Ameritech would already be compiling data on a monthly basis under the basic Bell Atlantic/NYNEX conditions, it should not be too burdensome to publish those results on a monthly basis as well. By contrast, a span of even three months can make a substantial difference to a potential new entrant in deciding whether to enter a market or in attempting to withstand the continuing anticompetitive conduct of an incumbent - especially one the size of SBC/Ameritech.

More stringent reporting requirements, however, are only a means to an end. While reports may measure performance, they cannot prevent SBC/Ameritech from acting in a discriminatory and anticompetitive manner. The Commission should attach conditions compelling the combined SBC/Ameritech to adhere to certain levels of performance in providing access to unbundled network elements and resold services. For each reporting category, SBC/Ameritech should be required to meet a certain threshold of performance (whether it be a set interval or a specific success rate) so that carriers can determine with certainty when they are receiving substandard service.

Although the Commission tentatively concluded in the Operations Support Systems rulemaking that it would be "premature" to develop performance standards,[20] without such standards, it will be impossible to meaningfully analyze whether SBC/Ameritech is providing its

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[20] *Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance*, CC Docket No. 98-56, RM-9101, Notice of Proposed Rulemaking (rel. Apr. 17, 1998), at ¶125.

competitors a level of service at parity with the service its provides to itself and its affiliates. If the Commission determines that there is insufficient information to develop performance standards for a particular reporting category, the Commission should require SBC/Ameritech to clearly identify the performance levels and intervals it would provide for itself, and adopt those as default performance standards.[21]

The Commission should also ensure that SBC/Ameritech cannot evade compliance with any merger conditions that are imposed, as Bell Atlantic-NYNEX has apparently done. As a practical matter, it will be extremely difficult, if not impossible, to undo the merger once it has been consummated. (Although that might be the only effective sanction). As an alternative, the Commission should establish a system of strict financial penalties for SBC/Ameritech's failure to adhere to the performance standards incorporated in the merger conditions.

For example, if SBC/Ameritech's performance vis-a-vis a CLEC in any category falls below the level of performance it provides for its own operations for two consecutive months, the Commission should assess a fine of $75,000 for each month that the substandard performance continues. The proposed amount of this fine has a sound basis. Pursuant to the Interconnection Agreement between SWBT and KMC in Texas, SWBT has agreed to pay KMC liquidated damages of $75,000 when it fails to meet certain minimum performance standards. Adopting performance penalties in the same range would help deter SBC/Ameritech from engaging in anticompetitive conduct.

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[21] The Commission should also require periodic independent third-party verification of SBC/Ameritech's OSS to better ensure that performance will be satisfactory on a going forward basis.

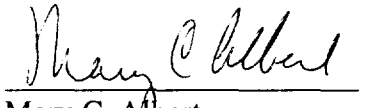
The Commission should also create an entirely separate system of penalties to be assessed in the event SBC/Ameritech violates other, non-performance related merger conditions. For example, if SBC/Ameritech fails to combine network elements at the request of a competitor or to provide reports on a monthly basis, the Commission should impose a fine of $500 per day for each violation. As in the case of the proposed penalties for performance breaches, this amount also has a sound basis; 47 U.S.C. § 502 allows the Commission to impose such a fine for each and every day that a person willingly and knowingly violates any Commission rule, regulation, restriction, or condition. The threat of such sanctions hopefully will provide a strong incentive for SBC/Ameritech to scrupulously comply with the merger conditions and avoid the type of compliance problems that have given rise to the MCI Complaint against Bell Atlantic/NYNEX.

CONCLUSION

For the foregoing reasons, the Commission should deny the SBC/Ameritech applications for transfer of control. In the alternative, the Commission should impose strict conditions on the merged company to protect the nascent competition in the combined entity's 13 state region and should subject SBC/Ameritech to steep financial penalties for failure to comply with the conditions.

October 15, 1998

Respectfully submitted,



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